INTERIOR BOARD OF INDIAN APPEALS

James M. Lira v. Acting Pacific Regional Director, Bureau of Indian Affairs

38 IBIA 36 (08/05/2002)

Reconsideration denied:
38 IBIA 107

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

JAMES M. LIRA, Appellant	:	Order Affirming Decision
v.	:	
	:	Docket No. IBIA 01-184-A
ACTING PACIFIC REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee	:	August 5, 2002

This is an appeal from an August 6, 2001, decision of the Acting Pacific Regional Director, Bureau of Indian Affairs (Regional Director; BIA), concerning the request of Appellant James M. Lira for approval of a road right-of-way over Pechanga Allotment 37 and tracts 36-G, 36-H, and 36-I within Pechanga Allotment 36. 1/ Appellant is the owner of Pechanga Allotment 32 and sought approval of the right-of-way based upon documents he submitted to BIA in 1982. The Regional Director held that Appellant must submit a new right-of-way application under 25 U.S.C. § 323 and 25 C.F.R. Part 169. For the reasons discussed below, the Board affirms the Regional Director's decision.

In March and April 1982, Appellant obtained the consent of the then-owners of tracts 36-G, 36-H, and 36-I and two of the then-owners of Allotment 37 to a 15-foot ingress/egress and utility right-of-way over their property. In July 1982, he applied to the Southern California Agency, BIA, for a right-of-way, as well as a loan in the amount of $54,930. For reasons that are unclear, the right-of-way application was never acted upon, and Appellant was never notified of the approval or disapproval of his application. 2/ However, Appellant assumed the right-of-way had been approved and began to use it for personal and business purposes.

1/ Allotment 37 is in undivided ownership. Interests totalling 20/96 are owned in fee by non-Indians pursuant to fee patents issued in 1973 and 1974. The trust interests are shared by four co-owners.

Allotment 36 was partitioned in 1981.

2/ Nothing presently before the Board shows whether or not Appellant received the loan for which he applied.

In early 2000, Donald Mojado, owner of tracts 36-G and 36-H, began to object to the vehicles, apparently large trucks, that were crossing his property in connection with business activities on Appellant's property. He learned that Appellant did not have an approved right-of-way and requested BIA to prepare a statement to that effect. Appellant then asked BIA to investigate the matter, stating that he believed the right-of-way had been approved in 1982.

Pursuant to these requests, Agency realty staff searched BIA files but did not locate an approved right-of-way or the documents Appellant had submitted in 1982. In a September 18, 2000, letter to Appellant, the Superintendent stated:

> It is our belief that [Appellant's] documents were either inadvertently lost, or (which is more likely) they were destroyed because they were not approved.
>
> * * * * * * * *
>
> Because you are unable to provide a copy of an approved road right-of-way document and, our records search did not produce an approved document, it is our opinion that no legal right-of-way exists.

Superintendent's Sept. 18, 2000, Letter at 2. The Superintendent advised Appellant that he could not continue to use the road without an approved right-of-way and offered to work with him to complete a new right-of-way application.

On October 10, 2000, the Superintendent issued a formal decision in the matter. He held that no right-of-way had been approved and that Appellant must therefore submit a new application in accordance with BIA's right-of-way regulations in 25 C.F.R. Part 169. He informed Appellant of his right to appeal the decision to the Regional Director. He also repeated his offer to assist Appellant with his application and stated that the application would be given the highest priority.

Appellant appealed the Superintendent's decision to the Regional Director, who affirmed it on August 6, 2002.

On appeal to the Board, Appellant argues that BIA should be ordered to approve the right-of-way based on the documents he submitted to BIA in 1982. He contends that the documents he submitted at that time were all that were needed for approval of a right-of-way. However, as discussed below, he fails to make such a showing in this appeal.

BIA has conceded that it lost or destroyed the documents Appellant submitted in 1982. However, Appellant evidently misplaced his own copies of some of those documents, as he does not produce them in this appeal and did not submit them to BIA when BIA was reviewing this matter in 2000-2001. In particular, Appellant has not produced any copy of an

application for a right-of-way. Although he has produced his transmittal letter dated July 20, 1982, and that letter lists a document described as "Request letter to B.I.A. for easement right of way" as among the documents being transmitted, the "Request letter" itself has not been produced. 3/ Further, although Appellant contends that he obtained the consent of all land-owners, and the July 20, 1982, transmittal letter lists "Request letters and consent letters from all land owners," the record does not show that he obtained the consent of all affected landowners.

The record includes copies of letters Appellant wrote to Donald Mojado, Edward Mojado, and Clarence Mojado on March 2, 1982. 4/ On the bottom of each letter, a handwritten statement appears, stating "I, [name of addressee] give [Appellant] permission to proceed in getting legal documents for a 15' easement thru my property described above." Additional language follows but is not legible on the record copies. Each of the handwritten statements appears to have been signed by the addressee.

The record also includes two letters dated April 23, 1982, one signed by Holly Sue Stevenson and the other signed by Maria Elizabeth Ricci, both of whom owned undivided interests in Allotment 37 in 1982. Each letter is addressed to Appellant and states: "This letter will serve as your authorization to proceed with the drafting of the legal documents necessary to record the granting of a fifteen (15) foot Ingress, Egress, and Utilities Easement." No consents from other owners of Allotment 37 are included in the record, although there were evidently other individuals holding trust interests in 1982. 5/

Further, it is clear that Donald Mojado and Edward Mojado are no longer agreeable to the right-of-way, at least under the conditions that exist at present. Thus, to the extent their 1982 statements may be deemed consent to the right-of-way, 6/ their present positions demonstrate that they have withdrawn that consent. Just as an Indian landowner may withdraw

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3/ For purposes of this decision, the Board presumes that the "Request letter to B.I.A. for easement right of way" was Appellant's right-of-way application.

4/ In 1982, Clarence Mojado was the owner of tract 36-H, which is now owned by Donald Mojado. Edward Mojado owned tract 36-I in 1982 and still owns it today.

5/ It appears from the materials in the record that, in 1982, Holly Sue Stevenson owned a 10/96 interest in Allotment 37 and Maria Elizabeth Ricci owned a 35/96 interest. (Both continue to hold undivided interests, although in different amounts.) In 1982, as at present, interests totalling 20/96 were held in fee by non-Indians. Thus, trust interests totalling 31/96 were unaccounted for in the consents Appellant obtained from Stevenson and Ricci.

6/ The Board reaches no conclusion as to whether any of the 1982 landowner statements would have constituted adequate consent for purposes of 25 C.F.R. § 169.3.

his/her consent to a lease at any time prior to approval of the lease, Rathkamp v. Billings Area Director, 21 IBIA 144 (1992), so too may an Indian landowner withdraw his/her consent to a right-of-way prior to BIA's approval of the right-of-way.

Clearly, BIA was at fault in 1982 in failing either to complete the right-of-way approval process or to notify Appellant that the right-of-way had not been approved. Appellant, however, was negligent in failing to inquire about the matter when he did not hear from BIA. In any event, BIA's failures in 1982 do not give Appellant a present right to have the right-of-way approved without a proper application and without the consent of the current landowners.

The Superintendent has indicated his willingness to assist Appellant with his right-of-way application. It clearly appears that discussions between Appellant and the affected landowners will be necessary if agreement is to be reached. The Superintendent may wish to seek assistance in this regard from the Department's Office of Collaborative Action and Dispute Resolution and is invited to contact the Board for further information about that office.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Regional Director's August 6, 2001, decision is affirmed. 7/

//original signed
Anita Vogt
Administrative Judge

//original signed
Kathryn A. Lynn
Chief Administrative Judge

7/ Arguments made by Appellant but not discussed in this decision have been considered and rejected.